No. 10,333

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES P. HART, Trustee of International Mining & Milling Company (a corporation), Debtor and Mount Gaines Mining Company (a corporation), Debtor,

Appellant,

vs.

CALIFORNIA PACIFIC TITLE AND TRUST COMPANY (a corporation), TITLE INSURANCE AND GUARANTY COMPANY (a corporation), HUMPHREY ESTATES, INC. (a corporation), HARRY LEE JONES, ARTHUR J. EDWARDS, D. R. GUSTAVESON, JAMES S. HAZEN, PERSIS E. HAZEN, BYRON HALVERSON and JOSEPH J. MUELLER,

Appellees.

BRIEF FOR APPELLEES, CALIFORNIA PACIFIC TITLE & TRUST COMPANY (A CORPORATION), AND TITLE INSURANCE AND GUARANTY COMPANY (A CORPORATION).

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BRIEF FOR APPELLEES, CALIFORNIA PACIFIC TITLE & TRUST COMPANY (A CORPORATION), AND TITLE INSURANCE AND GUARANTY COMPANY (A CORPORATION).

STATEMENT OF PLEADINGS AND FACTS IN REGARD TO JURISDICTION.

The petition of James P. Hart, as trustee of International Mining and Milling Company, and of Mount Gaines Mining Company, corporations in reorganization under Chapter X of the Bankruptcy Act, was filed March 2, 1942, in the reorganization proceedings then pending in the District Court of the United States, for the District of Nevada. An order to show cause was issued thereon directing the California Pacific Title & Trust Company, Title Insurance and Guaranty Company, and others to appear and show cause why the relief sought should not be granted. Primarily, the relief prayed for in the petition was the following:

> 1. That the court determine that debtor, Mount Gaines Mining Company, was the owner of certain real property (mining claims) situated in the County of Mariposa, State of California, and further that a judgment be entered directing certain appellees to convey title thereto to the Mount Gaines Mining Company by way of specific performance of an alleged option claimed to have been exercised.
>
> 2. That the court render a money judgment in favor of Mount Gaines Mining Company against some or all of the appellees for certain monies, which said monies were alleged to have been paid by Mount Gaines Mining Company to certain respondents as "rental" or "royalty" upon certain mining claims, and which were alleged to have accrued over a period of time when Mount

Gaines Mining Company was the alleged owner of these mining claims.

To this petition, appellee California Pacific Title & Trust Company, *appearing specially and solely for the purpose of its motion,* moved the court as follows:

1. To vacate the order of this court made on March 2, 1942, in so far as it directs service of a copy thereof and of the petition referred to therein upon this respondent and to quash the service thereof upon this respondent on the ground that this respondent is a corporation, organized under the laws of California, and was not and is not subject to service of process within the District of Nevada, and on the ground that this respondent has not been properly served with process in this action nor been served with process in the District of Nevada * * *

2. To dismiss the petition dated February 28, 1942, filed in the above proceedings by James P. Hart, petitioner, on March 2, 1942, and the proceedings based thereon as to this respondent on the ground that this court has no jurisdiction in this proceeding to entertain said petition as to this respondent nor in this proceeding to grant any of the relief prayed for in said petition as against this respondent, and on the ground that said petition fails to state a claim upon which relief can be granted against this respondent in this proceeding * * *

3. To dismiss said petition and the proceedings based thereon on the ground that said petition fails to state a claim upon which any relief can be granted against this respondent.

(Tr. pp. 37-38.)

The affidavit of Wm. H. Smith, Jr., filed on behalf of appellee California Pacific Title & Trust Company (Tr. pp. 39-41), shows that appellee California Pacific Title & Trust Company is a California corporation, has never transacted business in or been a resident of the State of Nevada, that service of the order to show cause was effected in the City of San Francisco, State of California, and that said appellee did not consent to the jurisdiction of the court either over itself or over the subject matter of the action.

The affidavit of Harry Geballe, filed on behalf of appellee California Pacific Title & Trust Company (Tr. pp. 41-43), shows that the only interest that appellee California Pacific Title & Trust Company ever had in and to the mining claims was that of trustee under and pursuant to an appointment made by the Superior Court of the State of California, in and for the County of Mariposa, on February 21, 1936; that thereafter and on September 3, 1940, California Pacific Title & Trust Company resigned as such trustee and conveyed the mining claims to appellee Title Insurance and Guaranty Company, the duly appointed successor trustee, by deed dated September 6, 1940, all pursuant to a decree of said court dated September 3, 1940. That since September 6, 1940, California Pacific Title & Trust Company has had no interest in or title to the mining claims as trustee or otherwise, and claims none.

Appellee Title Insurance and Guaranty Company filed a motion similar to that of appellee California Pacific Title & Trust Company. (Tr. pp. 29-30.) This

was accompanied by supporting affidavits in all respects similar to those filed by California Pacific Title & Trust Company, except that they show that appellee Title Insurance and Guaranty Company has held title as trustee to the mining claims since September 6, 1940, pursuant to the order of the court. (Tr. pp. 31-36.)

STATEMENT OF THE CASE.

Appellant's statement of the facts of the case (Appellant's Brief, pp. 7-13) is substantially correct as far as it goes. It fails in a material respect, however, to fully and properly state the questions involved in this appeal. Appellant states in his brief (p. 12) that "the decision of the Court in dismissing the case was made solely upon its opinion that the option had not been exercised for failure to make the $10,000.00 payment".

This conclusion fails to recognize the import of appellees' motions, each of which asks, among other things, that the petition and the proceedings based thereon be dismissed on the ground

> "* * * that this court has no jurisdiction in this proceeding to entertain said petition as to this respondent nor in this proceeding to grant any of the relief prayed for in said petition as to this respondent, * * *
>
> "* * * that said petition fails to state a claim upon which any relief can be granted against this respondent."
>
> (Tr. pp. 37-38, 29-30.)

And the order of the court, after reciting that "motions to dismiss of respondents, *based on jurisdictional and other grounds,* having heretofore been heard, submitted on briefs and by the Court taken under advisement" thereupon ordered "that the motions to dismiss are granted without prejudice". (Tr. p. 45.) It is true that the opinion of the court deals only with a consideration of the attempted exercise of the option to purchase, but it is evident from the order itself that such order granted all the motions then before the court which sought a dimissal.

The questions involved in this appeal are therefore:

1. Was jurisdiction acquired over appellees California Pacific Title & Trust Company and Title Insurance and Guaranty Company?

2. Did the court have jurisdiction to determine the claims asserted against said appellees in a summary proceeding?

3. Did the petition state facts sufficient to constitute a claim upon which any relief could be granted?

ARGUMENT.

THE ORDER GRANTING MOTIONS TO DISMISS PROCEEDINGS AS TO THESE APPELLEES WAS PROPER FOR NO JURISDICTION WAS ACQUIRED OVER THEM.

The petition asked for, primarily,

1. A determination of title to mining claims located in the State of California.

2. A money judgment.

It appears from the affidavit filed on behalf of appellee California Pacific Title & Trust Company (Tr. pp. 41-43) that said appellee held no title to or possession of the mining claims since the institution of these proceedings, as trustee or otherwise, nor does it claim any, which facts are not disputed.

The only claim, therefore, asserted against appellee California Pacific Title & Trust Company was *for monies,* alleged to have been paid by debtor to said appellee as trustee, and which consisted of rental and royalty payments due under a lease of the mining claims. It does not appear that appellee California Pacific Title & Trust Company held any such monies, as trustee or otherwise, belonging to said Mount Gaines Mining Company, but on the contrary the petition of appellant acknowledges that the monies paid to said appellee during its trusteeship were distributed to the respective beneficiaries of the trust (Debtor's Petition, Tr. p. 9), and the affidavit of Harry Geballe filed on behalf of said appellee (Tr. pp. 41-43) shows that said appellee was duly discharged from its trust on September 3, 1940, being prior to the institution of these proceedings.

The proceedings were summary in nature, initiated in a bankruptcy court in the judicial district of Nevada. Appellee California Pacific Title & Trust Company was a nonresident of this district, had never transacted business in the State of Nevada, and was not served therein. The action against said appellee was purely *in personam,* namely to obtain a money judgment. Said appellee did not consent to jurisdic-

tion over its person. It is submitted that under these facts the court acquired no jurisdiction over said appellee California Pacific Title & Trust Company; that such lack of jurisdiction is clearly established by the cases of *United States et al. v. Tacoma Oriental S. S. Co.* (C.C.A. 9th, 1936), 86 Fed. (2d) 363; *Bovay et al. v. H. M. Byllesby & Co. et al.* (C.C.A. 5th, 1937), 88 Fed. (2d) 990, and *Thompson v. Terminal Shares, Inc.* (C.C.A. 8th, 1939), 104 Fed. (2d) 1, Cert. Denied, 60 Sup. Ct. 100.

The case of *United States, et al. v. Tacoma Oriental S. S. Co.* (C.C.A. 9th, 1936), 86 Fed. (2d) 363, is particularly significant because of its similarity to the instant case. Debtor, in proceedings brought in the District Court in the State of Washington under Section 77B of the Bankruptcy Act, filed a petition alleging that the United States was indebted to it in certain sums under mail contracts, and that certain officers of the United States unlawfully withheld payment. An order to show cause was issued directing the United States and the officers to appear and show cause why payment should not be made.

The officers objected to the jurisdiction of the court, and moved that the petition be dismissed on the ground that the court had no jurisdiction over their persons, service having been made outside the territorial limits of the district.

The court recognized that Congress may, if it sees fit, authorize civil process outside the federal district wherein the court is situated. The question was whether such authorization had been given under the

provisions of the Bankruptcy Act. The court stated the question thus:

> "* * * whether the lower court had jurisdiction to issue process to appellant in another district under the facts of the case, pursuant to the provisions that 'the court * * * shall * * * have exclusive jurisdiction of the debtor and its property wherever located'."

The court pointed out that the officers were not holding *property* belonging to the debtor, that the action was one "purely in personam" and therefore under the circumstances no jurisdiction was obtained over the persons of the individual appellants. The court set aside the service as to them. It said:

> "We believe that the act giving exclusive jurisdiction of the lower court over debtor's property wherever located simply means that the res (the debtor's property) is to be considered solely under the jurisdiction of the lower court. Any wrongful invasion, interference, or disposition of that res is to be dealt with solely by the lower court. Jurisdiction over a person outside the lower court's jurisdiction, is given to the lower court, only if such person is in some manner invading, interfering, or disposing of the debtor's res, and then only to the extent of preventing or forestalling the invasion, interference or disposition of such res. *The act gives no jurisdiction to the trial court to issue its process outside its district in proceedings purely in personam,* in which no protection of the debtor's res is involved." (Emphasis added.)

In the concurring opinion of Denman, J., it is said, page 370:

> "Certainly here is no warrant for the extra-territorial service of the court's process in suits at law purely in personam."

In *Bovay, et al. v. H. M. Byllesby & Co., et al.* (C.C.A. 5th, 1937), 88 Fed. (2d) 990, a plenary suit was filed in corporate reorganization proceedings under Section 77B of the Bankruptcy Act against certain defendants who resided outside the district. It asked for monies alleged to have been fraudulently diverted from the treasury of the debtor. Defendants moved to dismiss the suit and to quash service as to them, claiming that they were nonresidents of the district and were served outside the territorial limits thereof. The sole question before the court was stated as follows:

> "Does such jurisdiction extend beyond the territory of the district in a suit in personam by the trustee appointed in a reorganization proceeding to require an accounting by defendants not inhabitants of the district, and not found therein, for monies alleged to have been fraudulently diverted from the treasury of the corporation * * *?"

The court held that the effort to take jurisdiction therein was a nullity and granted motions to quash service and to dismiss the suit. It said:

> "This is not a suit to recover property admittedly owned by the bridge company * * * It is a suit upon a chose in action, and seeks a judicial determination of the validity of an alleged indebtedness of appellees for monies due appellants as trustees of the debtor. It is conceded

> that a chose in action which belongs to the debtor is an intangible asset subject to the control of the bankruptcy court, but the title to the thing is not sufficient to confer jurisdiction over the person of the defendants owing the money who reside in another district and are beyond the ordinary processes of the court."

In *Thompson v. Terminal Shares Inc.* (C.C.A. 8th, 1939), 104 Fed. (2d) 1, Cert. Denied, 60 S. Ct. 100, an ancillary suit was brought by the trustee of Missouri Pacific Railroad Company, appointed in proceedings under Section 77 of the Bankruptcy Act. It was brought in the United States District Court for the Eastern District of Missouri. The bill sought to recover certain money alleged to have been paid by the debtor under certain contracts for the purchase of corporate stock, which contracts, it is alleged, were fraudulent and *ultra vires,* and asked that a lien be imposed upon the shares of the stock and that they be sold to satisfy the lien. The defendants were not served in the Eastern District of Missouri, and the property upon which the lien was claimed was not within said district. Defendants appeared specially and moved to set aside service, which motion was granted.

The court pointed out that the provisions of Section 77 and of Section 77B of the Bankruptcy Act were identical, so far as they covered the jurisdiction of the court, except that Section 77 provided that process of the court shall extend to and be valid when served in any judicial district.

The court sustained the ruling of the lower court, pointing out that even though the court had jurisdiction over the debtor and his property wherever located, and even though the act provided that process of the court shall extend to and be valid when served in any judicial district, nevertheless no jurisdiction was given to entertain such a suit as this against non-residents of the district not served therein.

The court said:

> "To sustain the lower court's jurisdiction of this suit would do violence to the general policy of Congress that persons shall not be subjected to civil suits except in the district of which they are inhabitants. (Citing cases.) The language used by Congress in Section 77, in conferring jurisdiction upon the courts of bankruptcy does not, in our opinion, indicate any intention to abandon that policy with respect to such suits as this."

Also:

> "Unquestionably, the claim of the trustees of the Missouri Pacific Railroad Company for an accounting and for the enforcement of the equitable lien asserted is an asset of the trust estate and as such is under the jurisdiction and control of the court of bankruptcy * * * The power of that court to preserve and safeguard the claim of the trustee does not carry with it the power to adjudicate its controversy with adverse and non-consenting defendants."

Appellee Title Insurance and Guaranty Company likewise was not a resident of the judicial district of Nevada, and was not served therein. It is equally

clear that the court had no jurisdiction over it to render a money judgment.

As to it, however, appellant asks the court in a summary proceeding to compel it, as trustee, to execute a deed conveying the mining claims to debtor Mount Gaines Mining Company by way of specific performance of an option to purchase alleged to have been exercised. But an action for specific performance is also one *in personam* over which jurisdiction of the person must be acquired. (*In re Avondale Farms Dairy, Inc.* (D.C., Pa., 1938), 25 Fed. Supp. 605.) The only possible basis upon which jurisdiction could be assumed by the court (no valid personal service having been had upon appellee Title Insurance and Guaranty Company, and the property being outside the territorial jurisdiction of the court) would be by reason of the fact that the debtor, Mount Gaines Mining Company, as lessee, was in physical possession of the property. It is conceded that upon a proper showing a bankruptcy court in proceedings under Chapter X of the Bankruptcy Act may make such orders as are necessary to conserve the assets of the debtor even though such assets are located outside the territorial jurisdiction of the court and even though the persons to whom the order is directed have not been so served with process that a personal judgment could be rendered against them.

However in the absence of a showing that there is a *threatened interference with the debtor's possession* and in the absence of a showing that the *assumption of jurisdiction is necessary to the completion of the*

reorganization proceedings, it is respectfully submitted that there is nothing in the Bankruptcy Act nor in the cases construing the same nor in the recognized texts on the subject which would warrant the conclusion that the act gives to the Federal District Court the power to direct its process outside the territorial jurisdiction of the court, or the jurisdiction to try title to property located outside thereof simply because the debtor is in possession as lessee.

ASSUMING THAT VALID SERVICE HAD BEEN OBTAINED UPON THESE APPELLEES, STILL THE ORDER DISMISSING THE PROCEEDINGS WAS PROPER FOR THE COURT HAD NO JURISDICTION IN A SUMMARY PROCEEDING TO HEAR AND DETERMINE THE CLAIMS ASSERTED AGAINST THEM.

The petition asks for a money judgment. It does not show that the monies claimed are in the possession of or under the control of these appellees, but on the contrary it acknowledges that the monies alleged to have been paid to them as trustees have been distributed to the beneficiaries of the trust. That under such circumstances, the court has no jurisdiction to grant relief by summary proceedings as to adverse claimants is clearly established by the case of *Warder v. Brady* (C.C.A. 4th, 1940), 115 Fed. (2d) 89. In this case, one Warder had been appointed special receiver by a state court for the benefit of certain bondholders of debtor corporation. Reorganization proceedings were instituted on behalf of the debtor, at which time Warder had certain funds in his hands in his capacity as receiver. The trustee in the reorganization proceed-

ings filed a petition for an order directing the receiver to turn over these funds to him. The receiver was validly served, and appeared specially and filed an answer in which he claimed title to the funds for the benefit of the bondholders. The matter was heard summarily upon the petition and answer, and a turnover order was made.

The order was reversed in part upon the ground that the court had no jurisdiction in a summary proceeding to order the monies paid over to the debtor, and that the fund could be sought only in a plenary suit.

The court holds that assuming that the court wherein the reorganization proceedings were pending might have had jurisdiction in a *plenary* action to recover this fund, in view of the inapplicability of Section 23 of the Bankruptcy Act to proceedings under Chapter X, such an action would nevertheless have to be a plenary and not a summary suit.

The court said, after discussing the provisions of the Bankruptcy Act on jurisdiction:

> "It does not follow, however, that the jurisdiction of the bankruptcy court over suits against an adverse claimant may be summarily exercised. The statute does not so provide; and under the well established procedural rule of the ordinary bankruptcy court, as we have seen, suits by a trustee to recover property from an adverse claimant in possession must take the form of a plenary action. This is especially true when the title to property is in dispute."

Furthermore, as to the question of the powers of this court to determine adverse claims of title to real property situated in the State of California, any determination must necessarily be based upon a construction of the laws of the state wherein the land lies. Since the decisions of the state courts are supreme as to the interpretation and construction of its laws in this respect, it was held in *Thompson v. Magnolia Petroleum Co.,* 309 U. S. 478, 60 S. Ct. 628, that such questions relating to title should properly be tried in the courts where the land lies.

Regarding jurisdiction of a bankruptcy court in reorganization proceedings when adverse claims are made, Thomas K. Finletter in his work on *The Law of Bankruptcy Reorganization,* 1939 Ed., page 163, says:

> "There may be an allegation by an outside party, not merely that he has a lien on property in the possession of the reorganization court, but that he owns the property himself and that therefore the asset in question is not a part of the estate which is being administered. If the actual possession of the property had been in the claimant he would have been entitled to have his rights determined in a plenary suit. The asset would not have been considered as a part of the estate. *There is no reason in principle why the ownership would not be decided in the same way when the physical possession happens to be in the debtor. The asset is no more a definite part of the bankrupt estate than when it is in the possession of the claimant. The dicta, but not the decisions, are to the contrary and authorize the adjudication of complete ownership in a summary*

proceeding when the disputed property is in the debtor's actual possession, but it is believed that in a contested case an adverse claimant would be entitled to a plenary hearing."

As further supporting the views hereinabove expressed, appellees cite the following authorities:

In re Standard Gas & Electric Co. (C.C.A. 3rd, 1941), 119 Fed. (2d) 658;

In re Avondale Farms Dairy, Inc. (D.C., Pa. 1938), 25 Fed. Supp. 605;

In re Greater Pythian Temple Association of New York (D.C., N.Y., 1937), 19 Fed. Supp. 762;

In re Roberts Mining & Milling Co. (D.C., Nev., 1936), 16 Fed. Supp. 424;

Gerdes on Corporate Reorganization, Sec. 868.

THE ORDER GRANTING THE MOTION DISMISSING THE PROCEEDINGS WAS PROPER FOR THE REASON THAT THE PETITION DID NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CLAIM UPON WHICH ANY RELIEF COULD BE GRANTED.

Any and all claims asserted in appellant's petition are predicated solely upon his contention that debtor exercised its option to purchase the mining claims. Appellant contends in his brief that the option was exercised upon the giving of written notice, and that immediately such notice was given, a mutually binding contract of sale existed.

The lease states in reference to the exercise of the option: *"$10,000.00 to be paid in cash at the time of*

notice to the first party of the exercising of said option to purchase." This language unmistakably contemplates *at least* two things, namely (a) the payment of $10,000.00 cash, and (b) notice. There is no justification for assuming that the giving of notice was more important than the payment of the cash. The petition does not show that the required $10,000.00 cash was paid or tendered at the time notice of exercising the option was given, *or at any subsequent time.* Mining option contracts are construed strictly against the optionee. Time was expressly made the essence of this option agreement; however, independently of stipulation, it is uniformly held that where mines or mining properties are the subject of contract, time is of the essence.

Fry, Specific Performance, 6th Ed., Sec. 1082;
Lindley on Mines, 3rd Ed., Sec. 859;
Snider v. Yarbrough, 43 Mont. 203, 115 Pac. 411.

In *Lindley's* work on Mines, 3rd Ed., Sec. 859, it is stated:

> "In respect to mineral property, it has been said that it requires, and of all properties perhaps the most, the parties interested in it to be vigilant and active in asserting their rights."

But appellant claims that the $10,000.00 cash payment was made by the "application" of rental and royalties previously paid. The option provides that in the event it is exercised such rental and royalties may be applied "from time to time * * * upon the

installment of purchase price next becoming due and payable *after the first installment mentioned herein*". The only provision for payment of the "first installment" is by "*cash* at the time of notice to the first party of the exercising of said option to purchase".

The absurdity of holding that previously paid rentals and royalties could be applied is demonstrated by the fact that under such a construction no advantage would be gained by optionee in exercising the option privilege until enough rents and royalties had been paid in to cover the entire purchase price. He could then, under such theory, claim the property.

The only question involved is whether or not the lease provided that the option to purchase could be exercised at any time by the giving of a notice and a demand that royalties previously paid be deemed to constitute the initial payment of $10,000.00. Little can be gained by laboring the argument that the lease simply does not so provide.

The provision authorizing the application of royalty payments upon the purchase price is expressly limited to those installments of the purchase price "becoming due and payable after the first installment" which first installment in turn is expressly required to be "paid in cash" in one sum of $10,000.00. Little can be added to the opinion of the court below on the point. Clearly the allegations of the petition do not state facts showing an exercise of the option in the manner required by the express terms of the lease set forth in the petition.

It is respectfully submitted that the order of the District Court granting the motions to dismiss and dismissing the proceedings should be confirmed.

Dated, San Francisco,
March 8, 1943.

Respectfully submitted,
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